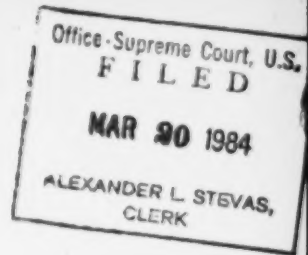


83 - 1859



NO. 83

In The  
*Supreme Court of the United States*  
Term, 198

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David R. Fothergill,  
*Petitioner,*  
v.

United States of America,  
*Respondent.*

**PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

David R. Fothergill  
1600 Sunrise Ave.  
Modesto, California 95350

*Proceeding Without Counsel*

March 20, 1984

### QUESTIONS PRESENTED

Whether Title 26 (Internal Revenue Code) has been enacted into law consistent with positive law mandated by the Public Salary Tax Act of 1939.

Whether the Sixteenth Amendment to the United States Constitution is an "excise" tax amendment.

Whether the Court of first instance (Federal District Court, for the Eastern District of California) and the administrative agency did follow and exhaust proper procedures before merging a civil matter into a criminal prosecution, thereby establishing jurisdiction over petitioner.

If authority in positive law of the United States provides or identifies petitioner as a "statutory employee" subject to "income" or "gross income" tax deduction thereby "required" to file an income tax return.

Whether any authority of the positive laws of the United States provides that respondent impose a "direct" tax *on* the "source" such as petitioners pay for labor/property.

### PARTIES BELOW

Appellant in the Court of Appeals was David R. Fothergill.  
Appellee in the Court of Appeals was the United States of America.

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NO. 83

In The  
*Supreme Court of the United States*  
Term, 19

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David R. Fothergill,  
*Petitioner,*

v.

United States of America,  
*Respondent.*

**PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

David R. Fothergill, petitions for a Writ of Certiorari to review the judgement of the United States Court of Appeals for the Ninth Circuit in this case.

**OPINIONS BELOW**

The "Findings of Fact and Conclusions of Law", dated January 13, 1983, is unreported and is set forth in Appendix A, reflecting the verdict and sentence of United States District Court for the eastern district of California (at Fresno). The opinion of the Court of Appeals, dated December 13, 1983 was submitted to petitioner in the form of a "Memorandum", is unreported, and is set forth in Appendix B. Denial of Petition for Rehearing is unreported, and is set forth in Appendix C, dated January 10, 1984.



## JURISDICTION

The judgement of the Court of Appeals was entered on December 13, 1983, and its order denying the Petition for Rehearing was entered on January 10, 1984. This petition has been filed within 90 (ninety) days of the denial. This Court has jurisdiction pursuant to 28 U.S.C., Section 1254.

Petitioner will show that issue of this writ will aid the Court's appellate jurisdiction, that there are present exceptional circumstances warranting the exercise of the Court's discretionary powers, and that it is impossible for petitioner to obtain adequate relief in any other form or from any other Court.

## CONSTITUTIONAL PROVISIONS

This case involves the following articles and amendments:

(1) Article I, Section 8, Clause 1; "The Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States" ...

(2) Article I, Section 9, Clause 4; "No capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration herein before directed to be taken."

(3) Amendment Five; "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

(4) Amendment Eight; "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

## STATEMENT OF THE CASE

This case arises out of criminal charges brought against petitioner, Dr. David Fothergill, based on an "information" filed on April 12, 1982 by the Internal Revenue Service charging violation of Section 7203 (four counts) of Title 26, U.S.C., (Internal Revenue Code), "Failure to file tax returns (A Misdemeanor)". Judgement and Probation/Commitment Order is set forth in Appendix D.

The Service has based its entire case on Title 26, U.S.C., better known as the "Internal Revenue Code", in particular sections 7203, 6012(a) and 61, claiming that Dr. Fothergill was a person requiring by law to file an individual income tax return for the years in question (1975, 1976, 1977, and 1978) because his "income" for those years exceeded the minimum amounts which would require him to file a return.

In an effort to respond to the demands of the Service, Dr. Fothergill filed statements designed to take the place of "returns" in which he indicated his arguments against their demands and requested the Service provide proof of the positive law authority upon which they based their demands. Dr. Fothergill, proceeding in Pro Per, continued to maintain his position during the trial that ensued sitting in general, that he was not a person required to file a tax return, that he had received no taxable income, and therefore could not have accumulated a tax "liability". Relying heavily on his constitutional rights and positive laws of the United States, Dr. Fothergill, being incompetent at legal procedure, utilized numerous documents readily available to the layman from "tax protest" groups for the purpose of furthering his case while he continued to search for a legal solution, acceptable in the Court, that would satisfy all parties involved.

The Court of Appeals for the Ninth Circuit refused to grant oral hearing on appeal and submitted only the "Memorandum" set forth in Appendix B, followed closely with the denial of appellant's petition for rehearing. (Appendix C)

Petitioner has been unable to obtain adequate relief in any other form or from any other Court and respectfully submits his petition for writ of certiorari in good faith.

## REASONS FOR GRANTING WRIT

Petitioner raises questions of law as to proceedings and the subsequent judgement rendered against petitioner as well as to the positive laws of the United States (that govern same). In so doing, petitioner contends that his fundamental rights and immunities have been grossly violated by the arbitrary and capricious acts and conduct of the administrative agency (Internal Revenue Service), resulting in a judgement against petitioner that has been unreasonable. Petitioner relies on the Constitution and positive laws of the United States, as well as the tax laws initiated by acts of Congress.

### *The Acts of Congress*

The Public Salary Tax Act, passed by Congress in 1939 consented that Federal officers and employees, *only*, could be taxed on "income" by the States or Federal government. Therefore, it is reasonable to conclude that Title 26, of the United States Code, having never been enacted into law, is inconsistent with the Public Salary Tax Act provisions when used as the basis of "law" to convict petitioner who is not, and has never been, a State or Federal "statutory employee", earning a taxable "income" and thereby incurring a tax liability, that mandates the filling of a tax "return".

Impetus for the legislation of the Public Salary Tax Act was furnished by a message to Congress from the President, dated April 25, 1938 (83 Congressional Records - 5683), recommending that legislation be enacted removing the reciprocal exemptions of salaries of Public employees and also the reciprocal exemptions of interest on public bonds.

The revision of the Supreme Court's views on exemption of public salaries and the legislation effectuating the court's new view undoubtedly represented important steps forward in the tax jurisprudence and increasing equity and justice in income taxation.

SECTION I amended section 22(a) of the Internal Revenue Code of 1939, which was the federal definition of gross income for income tax purposes. Section 22(a) formerly provided, among other things, that gross income includes income derived from salaries, wages, or compensation for personal service. During consideration of the Public Salary Tax Act, it was the theory that this

definition, as its language would indicate, is broad enough to include the compensation of State and local employees, however, that language has been repeatedly re-enacted by Congress in the income tax laws since 1913 without substantial change and interpretation and, based on this supposed Constitutional doctrine, has been that it did not include the salaries or wages of State and local employees. This led to fear that the courts might apply the "theory" that when there is an administrative interpretation of statutory language and that "language" is re-enacted in a new statute, the administrative interpretation becomes a part of the law itself and the interpretation can not be administratively changed thereafter. (*Helvering v R.J. Reynolds Tobacco Co.* (1939) - 59 S. Ct. page 423, L Ed Adv Ops page 370, and note: (1939) 27 Calif. Law Review, page 578.) To avoid any possibility of the application of this doctrine, Section I added to the definition language expressly stating that "gross income" included compensation for "Personal service as an officer or employee of a State, or any political subdivision thereof, or any agency, or instrumentality of any one or more of the foregoing." Therefore, no questions of statutory construction can arise with respect to the taxation of State and local officers and employees as to the year 1939, or subsequent years. (Petitioner is not a State or local officer or employee.)

Section IV contains a consent by the United States to taxation by the States of compensation received after December 31, 1938, for "Personal service as an officer or employee of the United States, any territory or possession or political subdivision thereof, one or more of the foregoing." The consent applies only to taxation by "any duly constituted taxing authority having jurisdiction to tax such compensation." The "consent" is further limited in that it applies *only* with respect to taxation which "does not discriminate against such officer or employee because of the source of such compensation." (Strictly speaking, this consent was probably not necessary since in *Graves v O'Keefe*, Supra note 7, the court stated that where Congress is silent, it will be presumed that there is no objection to taxation by the States or Federal employees salaries.) However, that case and prior cases indicated that possibly Congress could withdraw its employees from State taxation and the

consent clearly negates any intention to do so. Furthermore, the limitations on the consent clearly shows that Congress does not intend to permit discriminatory taxation or extension of jurisdiction to tax.

On October 21, 1942, Public Laws, Ch. 619, section 172, provided for the temporary income tax on individuals outside of federal jurisdiction. This was called the "Victory Tax Act of 1943" and *was repealed* on May 29, 1944. Following the "victory" act, the "Current Payment Tax Act of 1943" was under the jurisdiction of the Public Salary Tax Act of 1939, and is *voluntary* and only applies to State and/or Federal employees.

Therefore, it is reasonable to conclude that Title 26 (Internal Revenue Code) is not consistent with Public Salary Tax Act of 1939. Since 53 Statutes at large Chapter 59, page 574 of the Public Salary Tax Act was codified into Title 4 Section 106 and 111 of the U.S.C. and was enacted into positive law by 61 Statutes Chapter 389, Section 1 on July 30, 1947 and the Internal Revenue Code 26 U.S.C. is only *Prima Facie* law, United States Statutes *will prevail*.

The United States Statutes at large (53 Stats. Chapter 59, page 574), state the tax imposed by the Internal Revenue Code of 1954, Section 61(a) is an excise tax under the provisions of the Public Salary Tax Act of 1939.

"Compensation for services or wages" being defined in the Public Salary Act as an excise tax does not apply to petitioner.

"The official source of U.S. law is the statutes at Large and the U.S. Code (such as Title 26), is *only prima facie evidence of such laws*." (Royer's Inc. v U.S.C.A. pa (1959) 265 Fed 2d 615). The "code" establishes *Prima Facie* what the laws of the U.S. are, but to the extent that provisions of the "code" are inconsistent with the Statutes at Large, *the latter will prevail*". (Best Foods, Inc. v U.S. Cust. Ct. (1956) 147 F Supp. 749.)

Additionally, it is stated in the United States Code Congressional and Administrative News (1956) "Federal Tax Regulation",

that the Internal Revenue Code of 1954 falls under the provisions set forth in the Tax Act of 1939 in an editorial note;

"The enactment of the Internal Revenue code of 1954 (See 26 U.S.C.A. (I.R.C. 1954) section 1 et seq.) makes it desirable to establish a new title in the Code of Federal Regulations to be designated "Title 26 - Internal Revenue, 1954." The new title will contain those administrative rules and regulations, general and permanent in nature, which are effective as to all matters to which the Internal Revenue Code of 1954 is applicable. The new title does not supercede the present "Title 26 - Internal Revenue" as to those facts or circumstances to which the provisions of the Internal Revenue Code of 1939 are applicable.

*Regarding the Sixteenth Amendment . . .*

The Sixteenth Amendment did not give Congress the right to tax things that were not granted to them in the Constitution. The only things taxable under the provisions of the Constitution are duties, imposts, and excises (Article I, Section 8, Clause 1, of the U.S. Constitution). Petitioner will verify these facts pertaining to the sixteenth amendment as stated in the following cases:

Harry Hubbard - on the sixteenth amendment, 83 Harvard Law Review, 794 (1919-1920); "It is respectfully submitted that the Sixteenth Amendment clearly gives power to Congress to tax incomes from bonds and other securities issued by States, Cities, and other subdivisions of states and from salaries and wages paid by them."

The sixteenth amendment does not extend taxing power to new or excepted subjects, but merely removes all occasion for apportionment among states of taxes laid on income from whatever source. (William E. Peck & Co. v Lowe (1918) 247 U.S. 165, 62 L Ed 1049 38 S. Ct. 432, Bowers v Kerbaugh-Empire Co., (1926) 271 U.S. 170 70 L Ed 886, 46 S. Ct. 449; Sprouse v Commissioner (1941) Ca 9 122 F 2d 973, 143 ALR 226, Aff'd 318 U.S. 604, 87 L Ed 1029, 63 S. Ct., 791, 144 ALR 1335.)

The sixteenth amendment is not an income tax amendment but is an excise tax amendment. (See Congressional record speech by President Taft in re. "Intent of 16th amendment" - as an excise tax on corporations of 3% of their net income. (Year, 1909 pages 3344 and 3345.) Intent of 16th amendment is an excise tax measured by the amount of income; Income is merely the measure of the tax (1943) page 2580, March, 1943 - page 2579.

This excise taxing power was extended to government employees by the Public Salary Tax Act of 1939, and this information is found in the U.S. Code, Title 4, section 111, as follows:

SECTION 111: "The United States consents to the taxation of pay or compensation for personal service as an officer or employee of the United States, a territory or possession or political subdivision thereof, the government of the District of Columbia, or any agency or instrumentality of one or more of the foregoing."

SECTION 106 of the same Title 4, provides that: (A) No person shall be relieved from liability for an income tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, by reason of his residing within a federal area or *receiving income from transactions occurring or services performed in such an area*; and such State or taxing authority shall have full jurisdiction and power to levy and collect such tax in any federal area within such state to the same extent and with the same effect as though such area was not a federal area, (B) The provisions of subsection (a) shall be applicable *only* with respect to income or receipts received after Dec. 31, 1940, July 30, 1947, C 389, section 1, 61 Stats., 641.)

*"Exhausting" Procedures...*

Before the court took jurisdiction to hear and decide the criminal case, prosecution had to prove (1) on the administrative record and (2) on the judicial record that (a) jurisdiction does exist and (b) that all *relevant administrative procedures and statutes had been complied with* (73 C.J.S. "Public Administrative Bodies and Procedures" and "Courts"), and (c) a proper and fair hearing held as to all such matters. Petitioner contends that no such hearing was held at either the administrative or judicial level, in addition, the agency further failed to observe exhaustion of remedies by absence of required notice of tax deficiency (90 day letter), man-



datory in administrative procedures. 84 C.J.S. (on "Taxation"), states in order that a tax may be collectable, there must be a valid tax, there must have been a compliance with statutory conditions precedent to the exercise of the power to levy, there must have been a *valid assessment*, and there must be a time when, as well as a person to whom, payment can legally be made. Notice of tax deficiency was never received by petitioner, therefore respondents have violated the provisions of the Administrative Procedures Act (Title 5, U.S.C.) and petitioner has been denied relevant administrative procedures. As a result, the administrative record and the judicial record will show the administrative agency failed to prove that jurisdiction exists on both the administrative and judicial levels, contrary to law.

According to the Internal Revenue Service regulations, a tax must be assessed before it may be collected by the Internal Revenue Service. Assessment is barred until after "taxpayer" has had an opportunity to go to tax court (I.R.C., section 6213). The doctrine of exhaustion of administrative remedies is not a matter of judicial discretion, but is a fundamental rule of procedure laid down by the courts of last resort followed under the doctrine of *Stare Decisis* and is binding upon all courts. (*Abelleria v Dist. Ct. of Appeals, third district* (1941) 109 P 2d 942, 17 C 2d, 280, 132 ALR 715.

*In search of "statutory employees" ...*

Title 26, U.S.C., section 3401(c) contains this definition of the word "employee";

"For purposes of this chapter, the term 'employee' includes an officer, employee, or elected official of the United States, a State, or any political subdivision thereof, or the district of Columbia, or an agency or instrumentality of any one or more of the foregoing. The term 'employee' also includes an officer of a Corporation."

These are the only persons who are "employees" for purposes of income tax deduction and are, therefore, the only persons required to file a tax return and pay an excise tax. To further substantiate this contention, petitioner refers to Internal Revenue regulations 31.3401(c)- 1(c):

"Generally, physicians, lawyers, dentists, veterinarians, contractors, subcontractors, public stenographers, auctioneers, and



'others' (petitioner), who follow an independent trade, business, or profession, in which they offer their services to the public, *are not employees*.

Therefore, it is reasonable to conclude that *only* employees that are part of the State or Federal government, or working for them, are subject to an excise tax and obligated to pay an income tax on their wages or compensation for service and the withholding of taxes under the provisions of the Current Payment Tax Act of 1943.

The Internal Revenue Service is prohibiting from defining who is an employee for purposes of employment taxes: Congress made this expressly clear in public law 95-600, section 530, subsection (4) (b) page 2886 92 Stat. year 1978, which states:

(b) "Prohibition against regulations and rulings on employment status. No regulation or revenue ruling shall be published on or after the date of the enactment of this act and before January 1, 1980 (or, if earlier, the effective date of any law hereafter enacted clarifying the employment status of individuals for purposes of the employment taxes) by the department of Treasury (including the Internal Revenue Service) with respect to the employment status of any individual for purposes of the employment taxes."

(c) Definitions - for purposes of this section:

(1) Employment tax - the term "employment tax" means any tax imposed by subtitle C of the Internal Revenue Code of 1954.

(2) Employment Status - the term "employment status" means the status of an individual, under the usual common law rules applicable in determining the employer/employee relationship, as an employee *or* as an independent contractor (or other individual who is not an employee).

Since petitioner was not an employee as defined in the Internal Revenue Code, nor engaged in a taxable activity for purposes of an excise tax under the provisions of the tax act of 1939 and did not receive compensation taxable as an employment tax under subtitle D of the Internal Revenue Code of 1954, petitioner retains a fundamental, constitutionally protected, right to contract his labor as a common law independent contractor. This right is

guaranteed under the United States Constitution's ninth amendment.

*A tax on the source ...*

The tax being enforced and collected is a direct body labor use tax violating the legislative intent of the sixteenth amendment, Article I, Section 8, Clause 1, Article I, Section 9, Clause 4 and Article 9, Section 9, Clause 3 of the United States Constitution.

The 16th amendment authorizes Congress to impose an indirect tax on income from whatever source (property) derived without apportionment among the states. It appears clear that use of the prepositions "from" and "on" determine the legislative intent of the 16th amendment as an indirect tax. To be more specific, a tax *from* the source (property) determines an indirect tax (excise), and is constitutional, while a tax *on* the "source" (property), determines a *direct* tax, without apportionment and is *not* constitutional.

It follows that the tax imposed by subtitle A, section 61(a) of the Internal Revenue Code (formerly section 22(a) of the Internal Revenue Code of 1939), defining "gross income", is found in the Public Salary Tax Act - 53 Stats., Chpt. 59, p574, to include compensation for services (or wages) in gross income as an excise tax, again exempting petitioner from its definition. Petitioner receives no "gross income" or "income", for his labor. Further, petitioner's pay for labor realizes *no profit or gain*, but, is instead, an *even exchange*.

Petitioner states additional provisions of the U.S. Constitution have been violated and have, consequently, denied petitioner fundamental rights and immunities as set forth in ...

AMENDMENT FIVE:

(a) ... "be informed of the nature and the cause of the accusation"...

(b) ... "nor shall be compelled in any criminal case to be a witness against himself"...

(Production of numerous papers during the trial completed or constructed by petitioner for purposes not related to case, were introduced by prosecution and used to establish a "crime" had been committed by petitioner, thus forcing petitioner to bear witness against himself.)

(c)....“nor be deprived of life, liberty, or property without due process of law”.

**AMENDMENT EIGHT:**

.....“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted”....

Bail set for petitioner's release on a misdemeanor charge was in the amount of \$25,000.00, no arrest warrant was produced upon arrest, and when question of charges was raised petitioner was told by arresting officer, Internal Revenue Service Agent Don Mintens, “on tax”. Miranda Rights were not administered at the time of arrest. When petitioner inquired if I.R.S. agent had arrest warrant, agent responded, “I don't need one.” Petitioner was handcuffed and transported in view of patients and office personnel to a waiting car and taken approximately 100 miles to Fresno, California and incarcerated.

.....“unusual punishments inflicted”....

At court appearance for sentencing, U.S. District Court Judge Edward Dean Price demanded that in addition to the \$10,000.00 security bond, petitioner is required to report daily to a probation officer (even though imposition of sentence has been stayed pending the filing of petitioner's timely appeal), and is prohibited from traveling outside the northeastern district of California.

### CONCLUSIONS OF LAW

A. During each of the calendar years 1975, 1976, 1977 and 1978, the defendant was a person required to file an individual United States income tax return pursuant to the provisions of 26 U.S.C. § 6012(a)(1)(A), and pursuant to § 6012 (a)(1)(A)(iii).

B. During the calendar 1975, 1976, 1977 and 1978, defendant was not a person who was authorized and entitled to make the election pursuant to 26 U.S.C. § 6014.

C. The documents filed by the defendant and addressed to the Internal Revenue Service for the calendar year 1975 (See Government's Exhibit 1-7), for the calendar year 1976 (See Government's Exhibit 1-8), for the calendar year 1977 (See Government's Exhibit 1-9), and for the calendar year 1978 (See Government's Exhibit 1-10), Do not constitute a tax return within the meaning of the Internal Revenue Code, or regulations adopted pursuant thereto.

D. The defendant is guilty of Count I as charged in the Information.

E. The defendant is guilty of Count II as charged in the Information.

F. The defendant is guilty of Count III as charged in the Information.

G. The defendant is guilty of Count IV as charged in the Information.

H. Any Conclusion of Law contained herein which would be more properly construed a Finding of Fact shall be read as the same. Any Finding of Fact contained herein that more properly should be construed as a Conclusion of Law shall be read as the same.

DATED: January 14, 1983.

/s/ Edward Clark

EDWARD DEAN PRICE  
United States District Judge

## CONCLUSION

It has been petitioner's intention, (relying on whatever information and material available) throughout proceedings brought against him to establish his good faith and misunderstanding of the requirements of law. It has *not* been the intention of petitioner to avoid or delay any duty or responsibility rightfully imposed on petitioner in the Constitution or positive laws of the United States.

Nor has it been the intention of the petitioner to evade or defeat any tax he may lawfully be required to pay. Indeed, petitioner willfully pays constitutional excise taxes (from the "source") in excess of \$10,000.00 per annum.

The record will clearly show the Court's first priority was given to the emphasis of falsely identifying Petitioner as a "tax protester" leaving due process of law and the administration of justice in a fair tribunal without consideration.

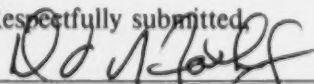
Petitioner's questions are directed to issues of law and, however poorly presented, the Court has violated petitioner's fundamental rights with "expedient" actions that preclude mandated procedures at both administrative and judicial levels.

In addition to the obvious omission of correct procedures and court transcripts that smack of prejudice throughout the trial petitioner has further suffered as the victim of "legal wrong" shown with the Court's denial of oral hearing on appeal and denial of petition for rehearing, so important to the presentation of petitioner's case as he proceeded without counsel.

Petitioner has consistently requested throughout all proceedings at both the administrative and judicial levels that respondents provide authority for their acts and conducts as set forth in the positive laws of the United States. Respondents have failed to answer, and/or, have evaded answers to petitioner's inquiries, and have instead, grossly violated petitioner's fundamental constitutional rights and immunities.

For the foregoing reasons, petitioner prays that writ of certiorari be granted.

Respectfully submitted,



Dated: 3-18-84

David R. Fothergill, Petitioner

## **APPENDIX A**

IN THE UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF  
AMERICA,

*Plaintiff*

v.

DAVID R. FOTHERGILL,

*Defendant.*

CR F 82-43-EDP

FINDINGS OF FACT  
AND

CONCLUSIONS OF LAW

I

FINDINGS OF FACT

1. At all times pertinent to this proceeding, the defendant David R. Fothergill (hereinafter Fothergill), was engaged in the practice of chiropractic in the City of Modesto, County of Stanislaus, State of California, which is situate in this court district.

2. By Information filed April 12, 1982, the defendant was charged as follows:

Count I - Failure to file a federal income tax return on or before April 15, 1976 for the calendar year 1975, in violation of the Internal Revenue Code, 26 USC § 7203.

Count II - Failure to file a federal income tax return on or before April 15, 1977 for the calendar year 1976, in violation of the Internal Revenue Code, 26 USC § 7203.

Count III - Failure to file a federal income tax return on or before April 15, 1978 for the calendar year 1977 in violation of the Internal Revenue Code, 26 USC § 7203.

Count IV - Failure to file a federal income tax return on or before April 15, 1979 for the calendar year 1978 in violation of the Internal Revenue Code, 26 USC § 7203.

3. Defendant filed a U. S. individual income tax return, Form

1040, for the year 1971 on January 14, 1974 (Government Exhibit 1-5). The return recites that the defendant's occupation is chiropractor and that he received business income of \$14,403.26.

4. Defendant filed a U. S. individual income tax return for the year 1972 on January 14, 1974. Defendant indicated his occupation on said return as that of chiropractor. On said return he reported his business gross income as \$26,427.40.

5. On April 20, 1976, defendant filed with the Commissioner of the Internal Revenue a document which stated in pertinent part:

**TO THE INTERNAL REVENUE BUREAU AND  
FRANCHISE TAX BOARD OF CALIFORNIA,  
THIS REPORT CONSTITUTES WRITER'S INCOME  
TAX RETURNS FOR THIS YEAR 1975.**

**AFFIDAVIT FOR TAXPAYERS PROTECTION**

**I HEREBY SWEAR UNDER PENALTIES OF  
PERJURY, THAT THE FOLLOWING STATEMENT  
IS TRUE AND CORRECT IN EVERY PAR-  
TICULAR: "I HAVE RECEIVED NO INCOME  
SINCE . . . MARCH 18th, 1968**

Said document was signed in the presence of and attested to by Normabelle Goesch, Notary Public. Attached to the foregoing affidavit was a blank return, Form 1040, containing no information from which Fothergill's tax liability, if any, could be determined. (See Government Exhibit 1-7.)

6. On or about April 18, 1977, defendant mailed to the Internal Revenue Bureau, Commissioner, Washington, D. C. an unsigned Form 1040 United States Income Tax Return for the calendar year 1976. It did not contain any information from which defendant's tax liability, if any, could be computed. (See Government's Exhibit 1-8.)

7. On or about April 15, 1978, defendant prepared and submitted to the Internal Revenue Service, a United States individual income tax return Form 1040 for the calendar year 1977. The form did not contain any information from which the tax liability of the defendant, if any, could be computed.

8. On or about April 14, 1979, defendant caused a United States individual income tax return, Form 1040A, to be prepared



and forwarded to the Internal Revenue Service for the calendar year 1978. This form did not contain any information from which the tax liability of the defendant, if any, could be computed. (See Government's Exhibit 1-10.)

9. Fran Nunes, formerly Fran McClanahan, worked at the same office as defendant during the calendar years 1975, 1976, 1977, and a portion of the calendar year 1978. The defendant was employed in the same office as a chiropractor during her tenure as office manager. Weekly, during her employment, she would make out a check payable to Dr. David Fothergill. On numerous occasions during this period, as a favor to the defendant, she would carry these checks to the bank and secure cash for them which she would deliver to the defendant. She identified the series of checks that she prepared during the calendar year 1975 (see Government's Exhibit 4-1), during the calendar year 1976 (see Government's Exhibit 4-3), during the calendar year 1977 (see Government's Exhibit 4-5), and during the calendar year 1978 (see Government's Exhibit 4-7).

10. Fran Nunes, formerly Fran McClanahan, was succeeded by Margaret Adams, as a clerical employee in the office where defendant was practicing. Ms. Adams worked at the Heersink-Fothergill chiropractic clinic during the period from April to November, 1978. Upon entering upon her employment in that office, she was instructed in her duties by Ms. Nunes, and she was told to make out a weekly check naming the defendant as payee. The amount of the check was to be calculated as a "percentage of some figure." The witness could not accurately recall the percentage factor which she used, or what figure the percentage factor was applied to. She too, on numerous occasions, as a favor to the defendant, cashed his checks and returned the cash to him. (See Government's Exhibit 5-1 and 6-3).

11. On April 1, 1975, defendant submitted a credit statement to Investor's Thrift, Modesto office, which indicated that he was self-employed as a chiropractor, Heersink-Fothergill; that the address of the office was on Roseburg; that he had been employed in that capacity for eight years and that his earnings were \$48,000 yearly.

This application was not signed by the defendant but was com-

piled in the ordinary course of business, and pursuant to the usual business procedures of Investors Thrift. (See Government's Exhibit 11-1.)

12. On January 8, 1976, defendant applied for credit with Continental Leasing, Modesto, California. Defendant signed this application, stating: "I represent the above information is accurate to the best of my knowledge and I intend it to be relied upon for the purposes of this application." The application indicates that the defendant is self-employed with Heersink-Fothergill; that the business is located at 913 West Roseburg, Modesto, California; that he is a partner in such business, and has been such for eight years. The application further indicates his gross monthly salary to be \$3,000. (See Government's Exhibit 8-1.)

13. On or about August, 1977, defendant submitted a signed Buyer's Credit Statement to the United California Bank, Oakdale Branch, Oakdale, California, which states as follows: "By signing this credit statement each applicant makes the above representations for the purposes of securing credit and states that all of the representations are complete, true and correct." Said application indicates that defendant is self-employed as a chiropractor and that his annual salary is \$50,000. The application further indicates that one of the addresses occupied by the defendant is 913 West Roseburg, Modesto, California, and that the defendant has been at that location for nine years. (See Government's Exhibit 9-1.)

14. On November 30, 1977, the defendant submitted another Buyer's Credit Statement to the United California Bank, Oakdale, California, which was signed by the defendant. Immediately above the defendant's signature, the following legend appeared: "By signing this credit statement each applicant makes the above representations for the purpose of securing credit and states that all of the above representations are complete, true and correct." The defendant's credit statement indicates that he is self-employed at 913 West Roseburg, Modesto, California, as a chiropractor and his earnings are \$5,000 per month. He indicates that he has been at that location for 9 years and 6 months. (See Government's Exhibit 9-2.)

15. At some time prior to October 11, 1978, John L. Schirra, accountant in the employ of the City of Modesto, conducted an audit of defendant's gross receipts from his profession as a chiroprac-

tor. A letter dated October 13, 1978, addressed at the defendant at 1600 Sunrise Avenue, Modesto, California, reads, in pertinent part, as follows:

Dear Dr. Fottergill [sic]:

At the meeting held October 11, 1978, it was determined that financial records are not maintained that accurately reflect the correct professional income. It was therefore agreed to estimate the income based on the practices of other chiropractors with similar practices. It was also agreed that the total professional income was divided on a ratio of 75% to Dr. Heersink and 25% to Dr. Fothergill.

Pursuant to that agreement and arrangement, Mr. Schirra, as accountant for the City of Modesto, computed defendant's gross receipts as follows:

1975 .....	\$30,040.00
1976 .....	34,800.00
1977 .....	37,200.00
1978 .....	33,000.00 (¾ only)

Mill Tax liability at \$390.40. Defendant ultimately paid this amount. (See Government's Exhibit 12.I.)

16. Throughout the years 1975, 1976, 1977 and 1978, the defendant was married to Marilyn Fothergill. In accordance with their usual custom and practice, agents and employees of the Internal Revenue Service, in order to make certain that a joint return may have been filed and indexed under the name of the spouse of a taxpayer suspected of failing to file a return, a search was made to determine if any returns were filed and indexed under the name of Marilyn Fothergill. No tax return for Marilyn Fothergill was found to have been filed by Marilyn Fothergill.

17. During each of the calendar years 1975, 1976, 1977, and 1978, defendant realized a gross income from the practice of his profession of chiropractor in excess of \$1,000.00.

18. During each of the calendar years of 1975, 1976, 1977, and 1978, defendant was married and was entitled to file a joint income tax return with his wife pursuant to 26 U.S.C. § 6013. During each of said calendar years, to wit, 1975, 1976, 1977, and 1978, defendant's gross income from his professional practice, when com-

bined with the gross income of his wife, was in excess of \$5,400.00.

19. On July 2, 1976 a letter was dispatched from the Internal Revenue Service, 5045 E. Butler Ave., Fresno, CA 93888, registered mail, return receipt requested, to David R. Fothergill, 913 West Roseburg, Modesto, CA 95350. Said letter read in pertinent part as follows:

Form No.: 1040

Tax Year: 1975

The United States individual income tax form we received from you for the above year is not acceptable as an income tax return because it does not contain information required by law, and it does not comply Internal Revenue Code requirements.

This is your notice of the legal requirements for filing federal income tax returns. Failure to file a required return may subject you to prosecution under Internal Revenue Code § 7203. The requirements and an explanation of the penalty are shown on the back of this letter.

We have enclosed two blank income tax forms for your convenience.

Said letter was receipted by Fran McClanahan on July 3, 1975. Mrs. Nunes, formerly Ms. McClanahan, testified that she received said letter, identified her signature as being on the return receipt, and either personally delivered the letter to the defendant or placed it in the usual place for his attention.

## APPENDIX B

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

UNITED STATES  
OF AMERICA,

*Plaintiff-Appellee,*

vs.

DAVID R. FOTHERGILL,

*Defendant-Appellant.*

No. 83-1028

**MEMORANDUM**

Submitted: October 31, 1983\*

**Appeal from the United States District Court  
for the Eastern District of California  
E.D. Price, District Judge, Presiding**

**Before: HUG, PREGERSON, and REINHARDT, Circuit Judges.**

David Fothergill appeals his conviction on four counts of willful failure to file federal income tax returns on the ground that the district court lacked jurisdiction to hear his case. We affirm.

Contrary to Defendant's contention, the district court does have jurisdiction to hear a criminal charge under 26 U.S.C. § 7203 (1976) (current version at 96 stat. 617, 618). 18 U.S.C. § 3231 (1976) provides the federal district courts with original jurisdiction of all offenses against the laws of the United States. This language includes offenses under 26 U.S.C. § 7203. Similarly, defendant's contention that the district court lacks jurisdiction because the oaths

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\*The panel finds this case appropriate for submission without oral argument to Ninth Cir. R. 3(a) and Fed R. App. P. 34(b). The panel has concluded that the issues presented by this appeal do not meet the standards set for Rule 21 of the Rules of this court for disposition by written opinion. Accordingly, it is ordered that disposition be by memorandum, forgoing publication in the Federal Reporter, and that is memorandum may not be cited to or by the courts of this circuit save as provided in Rule 21(c).

taken by the judges and officers of the court are not constitutionally sufficient is without merit. All judges and officers vow allegiance as required by Article VI of the United States Constitution. *See* 5 U.S.C. § 3331 (1982); 28 U.S.C. §§ 453, 544, 563, 951 (1976).

Defendant's argument that the district court lacks jurisdiction because the language of 28 U.S.C. § 7203<sup>1</sup> is ambiguous is meritless. The language of that statute is not unconstitutionally ambiguous. *United States v. Millican*, 600 F.2d 273, 278 (5th Cir. 1979), *cert. denied*, 455 U.S. 915 (1980); *United States v. Lachman*, 469 F.2d 1043, 1046 (1st Cir. 1972), *cert. denied*, 441 U.S. 931 (1973); *United States v. Ming*, 466 F.2d 1000, 1004 (7th Cir.), *cert. denied*, 409 U.S. 915 (1972). Finally, an unverified criminal information standing alone is sufficient to support a misdemeanor conviction. *Church v. United States*, 412 F.2d 836, 838 (9th Cir. 1969).

**AFFIRMED.**

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<sup>1</sup> 26 U.S.C. § 7203 states in part:

Any person required under this title to pay any estimated tax or tax . . . who willfully fails to pay such estimated tax or tax . . . shall, in addition to other penalties provided by law, be guilty of a misdemeanor

## APPENDIX C



*Defendant-Appellant.*

## ORDER

Appellant's Petition for Rehearing, filed December 27, 1983, is hereby denied.

## APPENDIX D

D1

United States of America vs.

## United States District Court for

DAVID R. FORTAGLIE

EASTERN DISTRICT OF CALIFORNIA, FRESNO

19830307

CASE NO. 1

CR 7-92-43-87

## JUDGMENT AND PROBATION/COMMITMENT ORDER

40-25311-1

In the presence of the attorney for the government  
the defendant appeared in person on this dateMONTH DAY YEAR  
FEBRUARY 14, 1983

CRIMINAL

☒ **WITOUT COUNSEL**

(However, the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.)

PLEA

☐ **WITH COUNSEL**

(State of counsel)

PLEA

☐ **GUILTY**, and the court being satisfied that  
there is a factual basis for the plea,☐ **NOT GUILTY**☐ **NOT GUILTY**FINDING &  
JUDGMENT

There being a finding/verdict of

☐ **NOT GUILTY**. Defendant is discharged.☒ **GUILTY**Defendant has been convicted as charged of the offense(s) of 26 USC 7203 - Failure to File Tax Returns  
(A MISDEMEANOR)SENTENCE  
on  
Probation  
or  
Prison

The court asked whether defendant had anything to say why judgment should not be pronounced, defendant so optioned, and to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and so it is done. The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of 2799 days, as to the charge in count one of the Information.

A like sentence is imposed as to the charge in count two, to run consecutive to the sentence imposed in count one.

A like sentence is imposed as to the charge in count three, to run consecutive to the sentence imposed in counts one and two.

A like sentence is imposed as to the charge in count four, to run consecutive to the sentence imposed in counts one, two and three.

SPECIAL  
CONDITIONS  
OF  
PROBATION

As to Count One ONLY, the defendant is ordered to pay a fine in the amount of \$10,000.00 to the United States.

ADDITIONAL  
CONDITIONS  
OF  
PROBATIONThe defendant is granted until March 12, 1983 to surrender to the custody of the U. S. Marshal, however upon the filing of a Notice of Appeal said sentence shall be stayed. A third condition of release is that the defendant shall appear in person at the U. S. Probation Office in Fresno by 12 noon, ~~on the first day of probation~~ on the first day of probation or within a reasonable period of time after the filing of the notice of appeal, to advise the court of any change of address or other circumstances which may affect the supervision of the defendant. The court may change the conditions of probation, suspend or extend the period of probation, or revoke the probation at any time during the probation period or within a reasonable period of time after the expiration of the probation period for a violation occurring during the probation period.GIVEN THE RE  
AND THE REASON  
THEREOF

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk of the Court enter a certified copy of this judgment and probation order in the U. S. District Court of the Eastern District of California.

SIGNED BY

U.S. District Court

U.S. Magistrate

EDWARD JOHN PRICE

Date

Feb. 14, 1983

J. R. GORDON

CLERK, U.S. DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

Best Copy Available